

MARCH 5. 1766.

A N S W E R S

F O R

Messieurs WALLACE, GARDYNE, and Company, Merchants and Manufacturers in *Aberbrothock*,

T O T H E

PETITION of *Patrick Miller*, Merchant in *Edinburgh*, for himself, and as Trustee appointed for the Creditors of *John Weir*, late Merchant in *Edinburgh*, and Messieurs *William Gibson*, *John Balfour*, and *Thomas Smyth*, all Merchants there.

MESSIEURS *Wallace*, *Gardyne*, and Company, Merchants and Manufacturers in *Aberbrothock*, having brought an Action against Messieurs *Patrick Miller*, *William Gibson*, *John Balfour*, *Thomas Smyth*, and *John Weir*, Merchants in *Edinburgh*, libelling, That the Pursuers had, at two different Times, sent to be whitened, at a Bleachfield in the Possession of the Defenders, as Partners, five Bales of Linen-cloth, containing 8183 stamped Yards, and two Bales thereof, containing 3226 $\frac{1}{2}$ Yards, making in all 11,409 $\frac{1}{2}$ Yards, the Receipt whereof was acknowledged by *John Weir* and Company, by Letters, dated the 7th and 16th of May 1765, and concluding for Re-delivery

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very of that Quantity of Linen to them, upon Payment of what was due for whitening the same, or otherwise to pay the Value of the said Cloth, being 475 *l.* 7 *s.* 11 *d.* *Sterling*, with Damages, and Expences of Process: It having been pled for the Defenders, That that Quantity of Cloth was truly the Property of the said *John Weir*, one of the Partners, as appeared from Letters of Correspondence in Process, and, as such, had been attached by Diligence used by his Creditors. To which it was answered, on the Part of the Pursuers, That, by these very Letters of Correspondence, founded on by the Defenders, it was plain, there was never any Bargain of Sale compleated concerning this Linen-cloth, betwixt *John Weir* and the Pursuers; and that although there was a Proposal of such a Bargain, yet *Weir*, sensible of his own bad Circumstances, honestly gave up the same before it was concluded. The Lord *Kennet*, Ordinary in the Cause, on the 17th of *December* last, pronounced the following Interlocutor upon Minutes of Debate: “ Having considered the Debate, and Letters produced; and, in respect it appears, that the Sale of the Cloth with *Weir* was never compleated, repels the Defence proponed for the Defenders, and decerns them to deliver to the Pursuers the above Linen-cloth, amounting to 11,409½ Yards, properly whitened and dressed, in terms of the Libel, the Pursuers, on receiving the same, paying to the Defenders for whitening the Cloth, at the Rate of one Penny *Sterling per Yard*, or otherwise to pay to the Pursuers the Value of the Cloth, as libelled; and finds the Pursuers intitled to Expences; and allows them to give in an Account thereof.”

The Defenders, Messieurs *Miller*, *Gibson*, *Balfour*, and *Smyth*, having offered a Representation to the Lord Ordinary, complaining of that Interlocutor, wherein they insist, not only upon an Execution of poinding that Cloth, by a Creditor of *John Weir*, but also upon a Disposition granted by him of his whole Effects, for the Behoof of his Creditors; his Lordship, upon

upon the 22d of *January* last, “ having considered the Representation, with the Answers, before Answer, ordained the Representers to produce the Horning and Execution of Poinding mentioned in the Representation; and also to condescend on the Date of the Disposition executed by *John Weir*, in favours of his Creditors, and that betwixt and *Tuesday* then next.” And, upon the 5th of *February* last, pronounced the following Interlocutor upon that Representation: “ The Lord Ordinary having again considered this Representation, with the Answers thereto, Missive-letters, and other Writings produced for either Party, adheres to the Interlocutor represented against, in so far as it decerns the Defenders to deliver to the Pursuers the Linen-cloth therein mentioned, properly whitened and dressed, the Pursuers, on receiving the same, paying to the Defenders for whitening thereof, at the Rate of one Penny *Sterling per Yard*, or otherwise to pay to the said Pursuers the Value of the said Cloth as libelled, but finds no Expences due.” After which, the Pursuers, on their Part, having applied to the Lord Ordinary, praying for an Alteration of that last Interlocutor, in so far as thereby no Expences were found due; at least, that the Consideration thereof might be reserved to the Issue of the Cause. His Lordship, on the 20th of *February* last, having considered that Representation, appointed the same to be seen.

The Defenders having now thought proper to apply to your Lordships by a Petition, reclaiming against these two Judgments of the Lord Ordinary, first above mentioned, upon the same Grounds insisted on before his Lordship, namely, That there was in this Case a Bargain of Sale fully concluded betwixt the Pursuers and *John Weir*, and, in Implement of that Bargain of Sale, the Cloth delivered to the Purchaser, whereby the Property was truly transferred to him; the following Answers to that Petition are humbly submitted to your Lordships Consideration.

First,

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First, That the Respondents humbly contend, that there never was in this Case any compleat Bargain of Sale made betwixt them and Mr. *Weir*, concerning this Linen-cloth. Your Lordships will please observe, from the Respondents Letter, dated the 7th of *May* last, as ingrossed in the Petition, that the first Offer of selling this Linen-cloth is made by them to the Company; and that Mr. *Weir*, in his Return to that Letter, upon the 16th of the same Month of *May*, after informing the Respondents, that the Company were to purchase no more Goods, he says: "As he was to carry on the Linen-trade in his own Name, as he did formerly, he should take their Offer, upon giving him four Months Credit, and should give his Acceptance, payable at that Time, which was but one Month more than their own Proposal;" whereupon the Respondents, by their Letter, which is dated the 17th of that Month, "condescended to that Offer, desired Mr. *Weir* might compute the Amount of the Linen, and send them his Acceptance, payable in four Months;" whereto they add in a Postscript, "That they had made out an Invoice of the Linen on the other Side, amounting to 426*l.* 18*s.* 11*d.* for which, if found without Error, Mr. *Weir* might transmit them his Acceptance."

That Mr. *Weir* was so far from finishing this Bargain, by examining whether the Price of the Linens amounted precisely to the Sum mentioned in that Postscript or not, and transmitting his Acceptance as desired, that upon the 24th of the same Month, he fairly, on account of his Circumstances, gave up any Concern in that Bargain.

These Circumstances considered all together, the Respondents humbly apprehend, it will appear obvious, that no compleat Bargain of Sale was ever here made betwixt Mr. *Weir* and the Respondents. There was an Offer of selling the Cloth to the Company. That Offer was never accepted by them. An Offer was made by Mr. *Weir* of purchasing that Cloth on the same Terms, with this Difference, that he should be allowed

lowed a Month's more Credit, and should give his Bill payable in four Months. This Offer was agreed to by the Respondents, but upon Condition that Mr. *Weir's* Acceptance should be sent for the Sum of 426*l.* 18*s.* 11*d.* upon being satisfied that the whole Price of the Linen amounted to that Sum, which Acceptance never was sent, but, on the contrair, the Bargain given up by Mr. *Weir* on account of his Circumstances. The Respondents will readily admit, that a Bargain of this kind might have been compleated without Writing; but this they have always understood, that, when a Bargain is agreed to be reduced into Writing, such Bargain remains incompleat, and can have no legal Effect, till a proper Writing actually interveen; and here, in their humble Apprehension, it was as much agreed upon betwixt the Parties, that this Bargain should be concluded by Mr. *Weir's* Acceptance of a Bill of 426*l.* 18*s.* 11*d.* payable at the Distance of four Months, as if it had been agreed, that a formal Contract should be entered into betwixt the Parties to the same Purpose; and that therefore, while no such Bill was accepted, the Bargain remained imperfect.

2dly, Even supposing the Contract of Sale to have been in this Case so far compleated between the Parties, as that there lay Action *hinc inde* for Performance thereof, it does not thence follow, nor is there any Ground to believe, that it was the Respondents Intention, by their Letter of the 17th of May, that the Property of their Goods should immediately, upon the Receipt of that Letter, be transferred from them to Mr. *Weir*, without the Supposal of which Transference of Property, the Petitioners, the Defenders, Plea is equally untenable, as if no Contract of Sale at all had interveened; for your Lordships will please observe, that this Cloth, after it was delivered into the Hands of the Bleaching-company, still remained the Property of the Respondents; and it seems to them unreasonable to put such a Construction upon that Letter of the 17th of May, as that thereby they meant to

transfer the Property of their Goods, unless, according to the exprefs Terms of that Letter, the Bill for the Price of those Goods was transmitted to them accepted.—The Respondents humbly apprehend, that, without such Acceptance, no Bargain of Sale can be understood to have been concluded betwixt the Parties; but allowing such Bargain to have been compleat, it appears to them very irrational to imagine, that they could mean to give away the Property of the Goods, without being possessed of a proper Document, that the Price of these Goods was due to them; and that therefore, while the Bill, in terms of that Letter, was not transmitted to them accepted for the Price of these Goods, the Property thereof remained with them.

3dly, Supposing, for Argument's sake, that the Respondents Intention, in this Case, was, That immediately upon Receipt of their Letter of the 17th of May, the Property of their Goods should be transferred to Mr. Weir, yet they humbly conceive, that still something remained to be done, which never actually was done on the Part of Mr. Weir, before the Property of their Goods could be legally transferred to him, *traditionibus non pactis dominia rerum transferuntur*, the Respondents take to be a Maxim in the Law of Scotland, as well as in the Civil Law, and to take place in moveable as well as heritable Subjects; the Possession of these Bales of Linen was not in Mr. Weir himself, but in the Company, whereof he was a Partner, in order to be whitened for the Benefit of the Respondents, the Proprietors of those Goods, when they wrote the Letter of the 17th of May; and, by the Books of the Company, it appears that these Goods are marked as taken in by John Weir and Company, and as belonging in Property to the Respondents. As the Possession then was not, upon the 17th of May, or when the Respondents Letter of that Date may be supposed to have come to Mr. Weir's Hand, in him, but in the Company, it appears plain to the Respondents, that some Act of Mr. Weir's was necessary, in order

order to the assuming Possession of those Goods himself, and to take them out of the Possession of the Company, before they could be understood to be delivered to him, and the Property thereof transferred by the Respondents to him; which Act of his was so far from ever intervening, that, by his Letter of the 24th of the said Month of *May*, he honestly gives up having any Concern with that Bargain. The Respondents would not be understood to mean, that a Redelivery of these Goods by the Company to them, and an After-delivery thereof by them to Mr. *Weir*, was necessary in order to transfer the Property thereof. In this Part of the Argument, they do not doubt, that, upon the Supposal the Bargain of Sale was compleat, and that their Intention was to transfer the Property, without waiting the Acceptance of the Bill for the Price, Mr. *Weir* might have gone to the Company's Warehouse, where the last Parcel of these Goods was, when he received the Letter of the 17th of *May*, and removed that Parcel of Goods from thence, and taken them into his own Possession, whereby the Property would have become his, and that he might likewise have gone to the Bleachfield, where the other Parcel of Goods then lay, and assumed the Possession thereof to himself, whereby the Property would also have become his; but he having been so far from doing any Act of that Kind, that he, expressly, by his Letter of the 24th of *May*, gave up any Concern in these Goods, the Respondents own, they cannot conceive upon what Principle it can be maintained, that the Property thereof ever belonged to him.

And, 4thly, even if it shall be supposed that the Property of these Goods was in the Person of Mr. *Weir*, upon his receiving the Respondents Letter of the 17th of *May*, yet they humbly conceive that he was not barred by any Law from surrendering that Property to them upon the 24th of that Month, when he found he could not pay the Price thereof. The Respondents apprehend, that although Mr. *Weir* had never

ver given up his Concern in that Bargain, they might with Reason have maintained, that it was fraudulent in him to receive their Goods, when he knew himself insolvent, and when he was within so few Days of giving up Business. The Respondents Letter of the 17th cannot well be supposed to have been in his Hands before the 19th of *May*, and the Bills whereupon the Defenders Diligence is raised, are protested and registrate the 23d of that Month, and a Meeting of his Creditors called the Day after. But, be that as it will, as, in the Respondents Apprehension, Mr. *Weir* was tied by the Rules of Honesty and Conscience to give up a Bargain made by him in these Circumstances, they cannot persuade themselves that it could be the Meaning of any Law to hinder him from doing such an Act of Justice. The Law has forbid a Person insolvent to prefer one Creditor to another, who had done more timeous Diligence, and has also forbid a notour Bankrupt to prefer one Creditor to another, after his notour Bankruptcy, or within sixty Days thereof. But the Respondents cannot persuade themselves that the doing such an Act of Justice as the giving up a Bargain, though concluded (but which, they apprehend, cannot be maintained in this Case) so recently before a Person's Bankruptcy, when he saw himself unable to perform the same, can be considered as the preferring one Creditor to another in the Sense of these Laws.

Before the Respondents conclude, they beg leave to make these Observations on some Particulars contained in the Petition: That whereas the Petitioners aver, that the Respondents had been in use to correspond with *John Weir* on his own account, before they had any Dealings with him and Company; that is a Mistake in Fact, for they never had any Dealings, either with him by himself, nor with him and Company, till *January 1764*, that the Company commissioned from them a Parcel of Linens. So that their first Concern was with the Company, and not with him.

That,

That, with regard to the Insinuation in the Petition, as if the Respondents had been unwilling to give up the Bargain with Mr. *Weir*, because they did not answer his Letter of the 24th of *May*, till the 27th of that Month, the Thing is extremely improbable in itself, that they could have the least Hesitation in giving up that Bargain, after receiving Mr. *Weir's* Letter, acquainting them of his Circumstances; and besides, it is very easily accounted for, how a Day or two may pass, before an Answer to a Letter is made, where a Company consists of several Persons, as that of the Respondents does, and that they don't live all together, in the same Place.

That there is a typographical Error in the first Line of the sixth Page of the Petition, where, instead of *The Linens were to be bleached and finished for our Account*; it should have been, *The Linens now to be bleached and finished for our Account*.

That, there is no Evidence to show, that ever *John Weir* was notourly bankrupt: That the Execution of Poinding, mentioned in the Petition, is dated after the 24th of *May* 1765, when *John Weir* gave up the Bargain with the Respondents, neither was there any Diligence used for Recovery of the Debt, whereupon that Execution of Poinding proceeded, upon the 24th of *May*, unless the protesting Bills, registrating the Protests in the Sheriff-court Books, and charging the Debtor therein to make Payment, shall be esteemed Diligence, which, it is believed, has never yet been found, so as to hinder the preferring of one Creditor to another, and that the Execution of Poinding only respects the second Quantity of Linens, being 3226 $\frac{1}{2}$ Yards, which were poinded out of the Company's Ware-house, but that there is no Appearance, that the other Parcel which was laid down in the Bleachfield, had ever been poinded; which Circumstances the Respondents do not think it necessary to enlarge upon, as they humbly presume your Lordships will be of
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opinion, upon the general Principles above mentioned, to adhere to the Lord Ordinary's Interlocutor.

The Respondents beg leave further to observe, that the Decision founded on by the Petitioners, that of *Jolly, &c.* against *Barclay of Almory Close*, does not at all apply to the present Case: For there, the Purchase of the Goods, being Iron, was made in the Beginning of *April 1760*, and the Buyer did not stop Payment till the 14th of *May* thereafter. In that Case, the Iron was originally delivered to the Buyer, and had been some time in his Possession as his Property. It was there agreed betwixt the Parties, that the Price of the Iron should only be paid six Months after the same was received, and the Bargain was so entered in the Buyer's Books; and there it likewise appeared, that the Buyer of the Iron, who, in the Event, had proved insolvent, continued to carry on Business in his ordinary Way, after that Bargain was made, till the 14th of *May*, when, to avoid Diligence, he set out for *London*.

In respect whereof, &c.

DAVID GRÆME.

